

§17-1737-40 Remedies for nursing facilities that do not meet the requirements for participation. (a)

The department shall impose one or more of the following remedies when a nursing facility does not meet one or more of the requirements of participation and its deficiencies constitute immediate jeopardy or widespread actual harm that does not constitute immediate jeopardy to the health and safety of its residents:

- (1) Remove the jeopardy and appoint temporary management to oversee correction of the deficiencies and assure the health and safety of the facility's residents while corrections are being made to bring the facility into compliance with all of the requirements of participation, or to oversee orderly closure of a facility.

- (A) Temporary management shall be state personnel, private individuals, or a team with education and requisite work experience in nursing home administration that qualifies the individual(s) to correct the deficiencies in the facility to be managed; and be licensed in accordance with state law. The following individuals are not eligible to serve as temporary managers:

- (i) Any individual who has been found guilty of misconduct by any licensing board or professional society in any state;
 - (ii) Has or whose immediate family members have any financial interest in the facility managed; or
 - (iii) Currently serves or, within the past two years, has served as a member of the staff of the facility;

- (B) Facility management must agree to relinquish control to the temporary manager and to pay his or her salary before the temporary manager can be installed in the facility. The facility cannot retain final authority to approve changes of personnel or expenditures of facility funds and be considered to have

- relinquished control to the temporary manager;
- (C) If the facility refuses to relinquish control to the temporary manager, the facility shall be terminated;
 - (D) A temporary manager has the authority to hire, terminate, or reassign staff, obligate facility funds, alter facility procedures, and otherwise manage a facility to correct deficiencies identified in the facility operation. The temporary manager must be given access to facility bank accounts that include receipts;
 - (E) A temporary manager may be imposed fifteen days after the facility receives notice, in non-immediate jeopardy situations; and two days after the facility receives notice, in immediate jeopardy situations; and
 - (F) Temporary management shall continue until a facility is terminated, achieves substantial compliance and is capable of remaining in substantial compliance, or decides to discontinue the remedy and reassumes management control before it has achieved substantial compliance, in which case the facility faces termination;
- (2) Assess civil money penalty, with interest, and impose civil money penalty for the number of days that a facility is not in substantial compliance with one or more participation requirements, regardless of whether or not the deficiencies constitute immediate jeopardy and for the number of days of past noncompliance since the last standard survey, including the number of days of immediate jeopardy.
- (A) Civil money penalties may be imposed as a remedy for past noncompliance that is corrected at the time of the current survey. Situations for consideration of a civil money penalty may include, but may not be limited to, facilities that cannot consistently sustain substantial compliance with the requirements as noted in the facility-specified reports,

- substantiated complaints, or situations which indicate that the facility did not act to prevent a situation of noncompliance from occurring;
- (B) The amount of the civil money penalty shall be on the lower range of \$50 to \$3,000 per day or on the upper range of \$3,050 to \$10,000 per day. A civil money penalty shall not be less than \$50;
 - (C) Factors to be considered in determining the amount of the civil money penalty are:
 - (i) The facility's history of noncompliance, including repeated deficiencies;
 - (ii) The facility's financial condition;
 - (iii) Seriousness and scope of the deficiencies;
 - (iv) Likelihood that the civil money penalty will achieve correction and continued compliance;
 - (v) The facility's degree of culpability; and
 - (vi) Any other remedies being imposed in addition to the civil money penalty;
 - (D) All funds collected as a result of these civil money penalties shall be applied to the protection of the health and property of the residents of the facility;
 - (E) The funds shall be used for:
 - (i) Payment for the cost of relocating residents to other facilities;
 - (ii) State costs related to the maintenance or operation of a facility pending correction of deficiencies or closure;
 - (iii) Reimbursement of residents for personal funds or property lost as a result of actions by the facility or by individuals used by the facility to provide services to residents; and
 - (iv) Other costs related to the health and property of the residents, such as, the cost of having resident

- medical records sealed, secured, and stored; the cost of picking up and transferring or delivering resident medications or drugs; the cost of using ambulance service; and etc.;
- (F) The civil money penalty may start accruing as early as the date the facility was first out of compliance, as determined by HCFA or the State. A civil money penalty cannot be collected until a provider requests a hearing. When no hearing is requested, payment of a civil money penalty will be due fifteen days after the time period for requesting a hearing has expired and a hearing request was not received or after the final administrative decision which includes a hearing and review; and
- (G) A notice of imposition of civil money penalty shall be sent to the facility and shall include the following information:
- (i) Nature of the noncompliance (regulatory requirements not met);
 - (ii) Statutory basis for the penalty;
 - (iii) Amount of penalty per day of noncompliance;
 - (iv) Factors that were considered in determining the amount of the penalty;
 - (v) Date on which the penalty begins to accrue;
 - (vi) Statement that the penalty will stop accruing on the date on which that facility comes into substantial compliance or is terminated from participation in the program;
 - (vii) When the penalty shall be collected; and
 - (viii) Statement of the facility's right to a hearing and information regarding how to request a hearing, implications of waiving the right to a hearing, and information regarding how to waive the right to a hearing;

- (3) Close the nursing facility or transfer the residents to other facilities or both, to minimize the period of time during which residents are receiving less than adequate care.
 - (A) A finding of immediate jeopardy will not require the State to close a facility and transfer residents. It may result in the immediate termination of provider agreement and the subsequent transfer of residents;
 - (B) During an emergency which relates to the facility's gross inability to provide care and related services because of fire, natural disaster, epidemic, or other conditions endangering the health and safety of the residents, the State may permanently or temporarily transfer residents to another facility until the original facility is again able to care for its residents; and
 - (C) Transfer requirements shall apply to only Medicare and Medicaid residents and not to private pay residents;
- (4) Terminate the nursing facility's Medicaid participation.
 - (A) When there is immediate jeopardy to residents' health and safety, termination procedures shall be completed within twenty-three days from the last day of the survey which found the immediate jeopardy, if the jeopardy is not removed before then;
 - (B) When there is no immediate jeopardy, HCFA or the State may terminate a facility if the facility does not come into substantial compliance within six months of the date of the survey that found it to be out of substantial compliance; and
 - (C) Termination may be imposed by the State at any time when appropriate for any noncompliance. The facility's compliance history shall be taken into account when considering whether or not to terminate a facility's provider agreement;

- (5) Impose denial of payment for new admissions when a facility has been found to have provided substandard quality of care on the last three consecutive standard surveys, regardless of other remedies imposed.
- (A) Deny payment for all new admissions within the third month from the last day of the third consecutive survey.
 - (B) Facility shall be given written notice at least two days before the effective date in immediate jeopardy cases and at least fifteen days before the effective date in all others;
 - (C) Optional denial of payment for all new admissions shall be imposed only when the facility makes little or no effort to come into substantial compliance, e.g., when it fails to adhere to its plan of correction;
 - (D) Mandatory denial of payment for all new admissions shall be imposed when the facility is not in substantial compliance by the third month after the last day of the survey identifying the deficiency or when a provider has been found to have furnished substandard care on the last three consecutive standard surveys;
 - (E) The denial of payment remedy may be imposed at other times singly or in conjunction with other remedies, when a facility is not in substantial compliance;
 - (F) The denial of payments shall continue until the State has verified that the facility has achieved substantial compliance. Payment resumes prospectively from the date the State has determined that substantial compliance is achieved.
 - (i) When payment is denied for repeated instances of substandard quality of care, the remedy shall not be lifted until the facility is in substantial compliance and the State or HCFA believes that the facility will remain in substantial compliance; and

- (ii) If payment is denied for any other reason and, if a survey team finds written credible evidence that the facility corrected deficiencies or was in substantial compliance before the date the survey agency received the credible evidence, the remedy shall be lifted as of that date;
- (G) No payments shall be made for the period between the date the remedy was imposed and the date that substantial compliance was achieved; and
- (H) Residents admitted before and discharged before the effective date of the denial of payment are considered new admissions, if readmitted, and are subject to the denial of payment; and
- (6) State monitoring shall be imposed when a facility has been found on three consecutive standard surveys to have provided substandard quality of care.
 - (A) State monitoring shall oversee the correction of cited deficiencies in the facility as a safeguard against further harm to residents when harm or a situation with a potential for harm has occurred. State monitoring shall include:
 - (i) Providing special consultative services to a facility for obtaining the type of training and basic knowledge needed to achieve and remain in compliance with federal regulations or to attend an in-service training program likely to correct the deficiencies; and
 - (ii) Assisting in the development of an acceptable plan of correction;
 - (B) Situations when state monitoring may be appropriate include, but are not limited to, the following:
 - (i) Poor facility history, i.e., a pattern of poor quality of care, many complaints, etc.;
 - (ii) State agency concern that the situation in the facility has the potential to worsen;

- (iii) Immediate jeopardy exists and no temporary manager can be appointed or the facility refuses to relinquish control to a temporary manager. A monitor shall be imposed to oversee termination procedures and transfer of residents; or
 - (iv) The facility seems unable or unwilling to take corrective action for cited substandard quality of care;
 - (C) Monitoring may occur anytime in a facility, i.e., twenty-four hours a day, seven days a week, if necessary. In all instances, monitors shall have complete access to all areas of the facility as necessary for performance of the monitoring task; and
 - (D) State monitoring shall be discontinued when:
 - (i) The facility's provider agreement is terminated; or
 - (ii) The facility is terminated; or the facility has demonstrated to the satisfaction of HCFA or the State Agency, that the facility is in substantial compliance with the requirements and (if imposed for repeated substandard quality of care) that the facility will remain in substantial compliance.
- (b) The appeal and hearing provisions of chapter 17-1736 shall be available to providers subject to state imposed remedies. [Eff 08/01/94; am 01/29/96; am 11/25/96; am 09/14/98] (Auth: HRS §346-14; 42 C.F.R. §§442.118, 442.119; Pub. L. No. 100-203) (Imp: Pub. L. No. 100-203; 42 C.F.R. §§431.152, 431.202, 442.118, 442.119)